1967

Mary v. Larsen and Mary Kaye and Sandra Lee Larsen, Minors, By Their Guardian Ad Litem, Mary v. Larsen, and Intermountain Service, Inc., A Utah Corporation v. Clover D. Christensen and Vernon L. Stevenson : Appellant's Brief

In the Supreme Court of the State of Utah

MARY V. LARSEN and MARY KAYE and SANDRA LEE LARSEN, minors, by their Guardian Ad Litem, MARY V. LARSEN, and INTERMOUNTAIN SERVICE, INC., a Utah Corporation,

Plaintiffs and Appellants,

vs.

CLOVER D. CHRISTENSEN and VERNON L. STEVENSON,

Defendants and Respondents.

Case No. 10833

APPELLANT'S BRIEF

Appeal from the District Court of
Salt Lake County, Utah
Honorable Leonard W. Elton, Judge

SKEEN, WORSLEY, SNOW
& CHRISTENSEN
701 Continental Bank Bldg.
Salt Lake City, Utah
Attorneys for Appellant

REX J. HANSON and
DON J. HANSON
520 Continental Bank Building
Salt Lake City, Utah
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah
Attorneys for Respondents

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

In the Supreme Court of the State of Utah

MARY V. LARSEN and MARY KAYE and SANDRA LEE LARSEN, minors, by their Guardian Ad Litem, MARY V. LARSEN, and INTERMOUNTAIN SERVICE, INC., a Utah Corporation,

Plaintiffs and Appellants,

vs.

CLOVER D. CHRISTENSEN and VERNON L. STEVENSON,

Defendants and Respondents.

Case No. 10833

APPELLANT'S BRIEF

NATURE OF CASE

This is an action for the wrongful death of plaintiff's decedent which resulted from an intersection collision between the motorcycle on which the decedent was riding and an automobile owned by the defendant Vernon L. Stevenson, hereinafter referred to as "Stevenson", and driven by the defendant Clover D. Christensen, hereinafter referred to as "Christensen".

DISPOSITION IN LOWER COURT

The lower court granted defendant Stevenson's Motion for a Summary Judgment upon the ground that as

a matter of law, defendant Christensen could not have been acting as agent for defendant Stevenson at the time of the accident.

STATEMENT OF FACTS

Plaintiff's decedent, Kurt E. Larsen, age 28, was severely injured on February 14, 1963 when struck at the intersection of Tenth East and First South Streets in Salt Lake City, as he rode motorcycle police escort for a funeral procession which was travelling east. He died March 30, 1963 of the head and chest injuries sustained in the accident.

The accident resulted when Christensen, travelling south on Tenth East Street, attempted to squeeze through the cars of the funeral procession and blocked the path of Kurt E. Larsen, who approached the intersection travelling east on the south side of the cars in the funeral procession. Christensen was driving the automobile owned by defendant Stevenson.

At the time of the accident, Christensen was the lessee and operator of a service station and had been so employed since June, 1961 (Christensen deposition, p. 10). Stevenson, owner of the car, had patronized Christensen's business since August or September of 1961 (Christensen deposition, p. 10-11). Christensen washed the car on a weekly basis and serviced it about twice every month

(Christensen deposition, p. 15). Except on rare occasions, Christensen would pick up the car at Stevenson's place of business for the service and then return the car to his place of business after the service was completed (Christensen deposition, p. 15). Christensen never billed or charged for pick up or delivery of the car, this being provided by him merely as an accommodation to Stevenson (Christensen deposition, p. 15).

On the day of the accident, Stevenson requested that Christensen install new tie-rod ends on the car, that he balance the wheels, wash the car and fill it with gas (Christensen deposition, pp. 18-19).

To carry out this request, Christensen drove to Stevenson's office and picked up the car as he usually did (Christensen deposition, p. 21). He returned the car to the service station and replaced the tie-rod ends. He then discovered that his wheel-balancing equipment was out of order so called to the Phillips 66 Training Station located at 2263 East 21st South Street and arranged for them to do the balancing work (Christensen deposition, pp. 21-22).

To reach the Training Station, Christensen drove south on Tenth East Street to First South Street where he encountered the funeral procesion proceeding in an eastwardly direction (Christensen deposition, pp. 24-25). Christensen thought he could squeeze through an opening

in the procession (Christensen deposition, pp. 26-27) and in attempting to do so the collision resulted.

At the time of the accident, Christensen was driving the car pusuant to Stevenson's instructions to get it repaired. The trip to the service station, like all other trips in the course of dealing between them, was without charge to Stevenson and without benefit to Christensen, monetary or otherise. The trip was made solely for the benefit and convenience of Stevenson and as an accommodation to him (Christensen deposition, pp. 23-24, 49-50). At the time of the accident, Christensen was carrying out no business and no purpose of his own (Christensen deposition, p. 40).

Notwithstanding the total lack of benefit to Christensen of the trip and the fact that it was undertaken wholly for the benefit of and pursuant to the instructions of Stevenson to get the car repaired, the Trial Court granted Stevenson's Motion for Summary Judgment holding, as a matter of law, that Christensen could not have been acting as agent for Stevenson at the time the accident occurred. This appeal followed.

ARGUMENT

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE QUESTION OF AGENCY SHOULD HAVE BEEN SUBMITTED TO THE JURY.

In Utah, as elsewhere, courts should be reluctant to invoke the drastic remedy of a summary judgment, since it prevents a litigant from fully presenting his case to the courts. *Brandt v. Springville Banking Co.,* 10 U. 2d 350, 353 P. 2d 460 (1960). Only where the pleadings, evidence, admissions, and inferences therefrom, when viewed most favorably to the losing party, show clearly that there remains no genuine issue as to any material fact, and that the winner is entitled to judgment as a matter of law, is it proper to grant a summary judgment. Such a showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial. *Frederick May & Co. v. Dunn,* 13 U 2d 40, 368 P. 2d 266 (1962). On appeal from a summary judgment this Court is obliged to consider the evidence and all reasonable inferences therefrom in the light most favorable to the losing party. *Whitman v. W. T. Grant Co.,* 16 U 2d 81, 395 P 2d 918 (1964).

Thus, the plaintiffs, having suffered the entry of summary judgments against them, and having been wholly deprived of their right to fully present their case in the lower court, are entitled to have their position considered on this appeal in a light most favorable to them.

It is well established in Utah that if there is any evidence indicating the existence of an agency relationship, the agency issue becomes a question of fact to be

decided by the jury. Thus, in *Goddard v. Lexington Motor Co.*, 63 U. 61, 223 P. 340 (1924), the plaintiff sought to hold the defendant liable for the acts of a third party whom the plaintiff claimed was the defendant's agent. The Trial Court entered a non-suit against the plaintiff, finding no agency as a matter of law.

The Supreme Court reversed the non-suit, and the basis of the decision was stated as follows:

> "When any evidence is adduced tending to prove the existence of a disputed agency, its existence or non-existence is as a general rule a question of fact for the jury, aided by proper instructions from the court, *even though the evidence is not full and sasisfactory*, and in such cases it is error for the court to take the question from the jury by directing a verdict by instruction, by nonsuit, or by sustaining a demur to the evidence." (Emphasis added.)

The quoted rule was reaffirmed in *Adamson v. United Mine Workers*, 3 U. 2d 37, 277 P. 2d 972 (1954), wherein the agency question was decided as a matter of law only because there was absolutely no evidence that the alleged tort feasors were agents of the defendant since their identity was unknown.

In the present case, there is ample evidence in the record from which the trier of fact could determine that Christensen was acting as the agent of Stevenson at the

time of the accident. Therefore under the holding of the *Goddard* case and other applicable authorities cited hereafter, the agency issue should have been submitted to the jury.

While driving the car, Christensen was engaged in an activity separate from and unrelated to the actual repair work. The driving was undertaken for the benefit of Stevenson without charge (see cases discussed *infra*). Thus, although Stevenson exercised little or no control over the repair work on the car and as to such Christensen was clearly an independent contractor, a jury could nevertheless reasonably conclude that in the driving of the car for the benefit and purposes of Stevenson and as an accommodation and courtesy for him, without compensation, Christensen was acting as his agent.

Christensen stated unequivocally that at the time of the accident he was engaged solely in the business and for the benefit of Stevenson (Christensen deposition, p. 40), and that he received no benefit from the trip since he was not being paid for the time to drive the car to the Training Station (Christensen deposition, pp. 23-24, 49-50) and he made no profit or mark up on the charge made by the Training Station (Christensen deposition, pp. 23-24, 49).

Stevenson had authorized and directed Christensen to drive the car to and from the place where any service

would be rendered and impliedly authorized him to do whatever was reasonably required to get the repair work done. He was accustomed to not being charged for pick up or delivery of the car, although he expected to pay for the repair work.

Apparently the Trial Court was of the opinion that since there appeared to be little dispute as to the events which surrounded Christensn's driving the car at the time of the accident or the nature of the relationship between Christensen and Stevenson, the issue of agency became a matter of law, and nothing remained for determination by the trier of fact. However, it is clear that even where the events and circumstances may be established, a jury question on the ultimate issue in dispute remains, nevertheless, if different inferences can be drawn from the undisputed facts.

In *Abdulkadir v. Western Pacific Railroad Company*, 7 U. 2d 53, 318 P. 2d 339 (1957), the court stated:

> "It is acknowledged that in the face of a Motion for Dismissal on Summary Judgment, the plaintiff is entitled to have the Trial Court, and this Court on review, consider all of the evidence which the plaintiff is able to present, *and every inference and intendment fairly arising therefrom* in the light most favorable to him." (Emphasis added.)

This is especially so where, as in this case, the defendants alone are in possession of the facts concerning th relationship between them at the time of the accident.

In *Richards v. Anderson,* 9 Utah 2d 17, 337 P. 2d 59 (1959), the court stated:

> "When a summary judgment is granted against a party, he is entitled to have the Trial Court, and this court on review, consider all of the evidence *and every inference fairly to be derived therefrom* in the light most favorable to him." *Accord, Bridge v. Backman,* 10 Utah 2d 366, 353 P. 2d 909 (1960). (Emphasis added.)

Illustrative of this rule is the case of *Tanner v. Utah Poultry Farmers Cooperative,* 11 Utah 2d 353, 359 P. 2d 18 (1961). In that case the Trial Court granted a summary judgment in favor of the plaintiff on the ground that prior to the commencement of the action the defendant had signed a release. Although the wording of the release was undisputed, the intent behind the release and the inferences to be drawn therefrom raised a jury question, and thus the summary judgment was set aside.

In *Bridge v. Backman,* 10 Utah 2d 366, 353 P. 2d 909 (1960), the issue was whether a testator had been unduly influenced in executing a will. The facts relevant to the relationship between the testator and the party who allegedly exercised undue influence were established without

dispute, yet summary judgment was denied upon the ground that the inferences to be drawn from these facts were subject to determination. In the course of the opinion, the court stated:

> "In determining the sufficiency of the showing me must view the evidence *and inferences therefrom* in a light most favorable to the party against whom such judgment is sought. So, unless there is a showing that the disfavored party cannot produce evidence which would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous." (Emphasis added.)

That reasonable minds can differ as to whether an agency relationship existed in the instant case is supported by the following cases in each of which an agency relationship was found to exist on facts similar to those involved here.

In *Deep Rock Oil Corp. v. Fox*, 63 P. 2d 24 (Okla., 1936), the plaintiff was riding his motorcycle and collided with a car owned by one Williams and driven by one Brien. The jury returned a verdict against the car owner and employer, finding that the driver's negligence caused the plaintiff's injuries. The automobile owner appealed the verdict upon the ground that there was no evidence upon which a jury could find that the driver was the agent of the owner at the time of the accident. The court upheld the verdict, however, stating that from

the evidence the jury was justified in finding an agency relationship. The court summarized the evidence upon which its holding was based as follows:

> "All this testimony went to the jury as being true, and the inferences and intendments deductible therefrom to the effect that Morris Brien (the driver) had procured the car from Mr. Williams (the owner) on that particular morning, had taken it to the Deep Rock Station, was servicing said automobile immediately before the accident, and did leave the service station in his uniform, driving directly toward the garage where Mr. Williams kept his car, and while doing so was involved in this accident."

In *Andres v. Cox*, 23 S.W. 2d 1066 (Mo., 1930), the defendant car owner delivered her car to the defendant repairman for service. It was customary for the repairman to deliver the car back to the owner after the completion of repairs. However, upon the occasion in question the repairman took the car to the owner's home and found she was absent. Since further repairs were required, he decided to return the car to the garage to complete these further repairs. Enroute back to the garage the repairman struck the plaintiff causing the injuries complained of.

The court affirmed a jury verdict in favor of the plaintiff holding that the jury could find that the garageman was the agent of the owner of the car. In the

course of the opinion, the court noted in language particularly applicable to the present case:

> "Ridel (the repairman) was exercising an independent occupation as a repairman, and rendered the service of repairing the appellant's car in the course of such occupation, and under circumstances which made him an independent contractor as to that service there seems to be no question, but it does not necessarily follow from this that he was an independent contractor as to the service he rendered in an attempt to deliver the car to the appellant after the repairs were made. The delivery of the car was no part or concomitant of his independent occupation as a repairman.
>
> * * *
>
> "If the driving of the appellant's car by Ridel in his attempt to deliver it to her home was done, upon the completion of the repairs he was employed to make, as a mere accommodation or favor to her, and with her acquiescence and consent, and not in pursuance of an agreement with him to include this act of driving as a part of the general charge inclusive of the repairs to the car, then in so driving the car he was acting as a servant, and not as an independent contractor, and if he was acting as her servant in so driving her car home, and on arriving at her home found no one there to receive the car, he had implied authority to return the car to his shop, and, if he did so, without any request or direction from her to do so for the purpose of making further repairs upon it, he was, in so doing, still acting as her servant."

The facts of the *Andres* case are indistinguishable from those involved in the present case since in both cases the repairs undertaken by the garageman were at least temporarily suspended and the car was being driven at the time of the accident under an implied permission of consent for the benefit of the owner without charge by the garageman.

In *Holloway v. Schield,* 243 S.W. 163 (Mo., 1922), the defendant automobile owner drove his car to defendant's garage for servicing. An employee of the garage drove the owner to his home and while returning the car to the garage was involved in an accident. The plaintiff sought to hold the automobile owner liable for the negligence of the garage employee. The court held that it was error to find, as a matter of law, that no agency relationship existed. The court concluded:

> "Under such circumstances, and in the light of the foregoing authorities, it cannot be held as a matter of law that the relation of master and servant did not exist between Schield (the owner) and the driver O'Doud. The question was for the jury."

In *Jimmo v. Frick,* 99 A. 1005 (Pa., 1917), the defendant automobile owner had a garage employee drive him around on various errands and then return the car to the garage. An accident occurred while the car was being returned. The court held the finding of agency was

justified on the ground that it was the owner's business that the driver was engaged in, and the owner had a right to control since he could have dismissed the driver, directed his route, or given him any special directions.

In *Gordon v. Peters*, 39 N.E. 2d 681 (Ill., 1942), the automobile owner had delivered his car to the garageman for cleaning. The garageman ran out of supplies during the cleaning process and took the car to obtain the supplies. While driving back to the garage with the supplies an accident occurred. The court reversed a judgment notwithstanding the verdict in favor of the car owner holding that the jury could find that the garageman was the owner's agent while obtaining the supplies.

In *Mattocks v. Emerson Drug Co.*, 33 S.W. 2d 142 (Mo., 1930), the car owner, through its agent, took an automobile to one Fleener, an amateur mechanic, for repairs and servicing. Fleener made many of the specified repairs and then discovered that he did not have some of the equipment that would be needed to make further repairs. Fleener drove the car to a nearby supply house to obtain the needed equipment and was involved in an accident.

The plaintiff there sought to hold the defendant liable for Fleener's negligence on an agency theory. However, the Trial Court sustained the defendant's demur and the plaintiff appealed.

The Missouri court held that the question of agency should not have been taken from the jury. In the course of the opinion the court stated:

> "It is well to bear in mind that whether one is a servant or an independent contractor in a given case is usually to be arrived at by inference from the contract, the nature of the employment, and all the relevant facts and circumstances; and that, consequently, the court will not be justified in taking the case from the jury, unless the facts *and the legitimate inferences* to be drawn therefrom are undisputed, and unless the evidence is clear and unequivocal." (Emphasis added.)

So in the present case all of the relevant facts and inferences should be weighed by the trier of fact in determining the agency question.

In *Chute v. Morey*, 125 N.E. 574 (Mass., 1920), the repairman was instructed to find what was wrong with the car, and upon discovering the problem to fix the car and then to test drive it to make sure of the work. During the test drive the car was involved in an accident. The injured party sought to hold the owner liable for the negligence of the garage employee who was driving the car at the time of the accident. The court there held that the question of agency was properly submitted to the jury and that the jury was justified in finding that an agency relationship existed between the owner and the driver.

In *Ryciak v. New York Oversea Company,* 200 N.Y.S. 379 (New York, 1923), an accident occurred while a garage employee was delivering a car to its owner. The court held:

> "The question should have been left to the jury to determine whether the turning over of the car to the garage keeper's employee to be returned to the garage was in furtherance of the defendant's (owner's) business, if done as an accommodation and at the request of the defendant's representative, and, if not as an accommodation, but in pursuance of an agreement with the garage keeper to include this act of delivering as part of the general charge inclusive of the storage of the cars, that then the driving at the time of the accident was the act of the garage keeper's servant, and not that of the defendant's (owner's) servant."

In *Stewart Taxi-Service Company v. Roy,* 95 A. 1057 (Md., 1915), the court held that the jury was justified in finding an agency relationship between the owner and the garage employee where the accident occurred as the latter was test driving the owner's vehicle subsequent to repairs.

In *Curry v. Bruns,* 285 N.W. 88 (Nebr., 1939), as in the present case, the Trial Court decided the agency question as between the garageman and the owner as a matter of law. The appellate court reversed, holding that the issue was a matter to be decided by the jury. In the course of the opinion, the court stated:

"When one has contracted with a competent and fit person, exercising an independent occupation, to do a piece of work for him according to the contractor's own methods and without his being subject to control, except as to the result of his work, the relationship is that of an independent contractor and not that of an agent or servant.

"On the other hand, one who drives a car as a mere accommodation or favor to the owner of the car is the servant of the owner.

"The right of control, or the want of it, is determinative of the relationship; for one who has no right of control over another ought not to be required to answer for his act, and, on the other hand, if one has such right of control he should be answerable. Whether or not the right of control existed is ordinarily a question of fact for the jury, and is usually arrived at by inference from the terms of the contract, the character of the employment, and all of the relevant facts and circumstances. Where the facts are in dispute or more than one inference can be drawn therefrom, the question is for the jury."

In *Marron v. Bohannan,* 133 A. 667 (Conn., 1926), the court held, as a matter of law, that the delivery of the automobile to the owner by an employee of a garageman created an agency between the automobile owner and the garage employee. Thus, on facts similar to those involved in the instant case, the agency question was resolved in that case by the court's holding that an agency relationship *did* exist *as a matter of law.*

The fact that the *Marron* case and the instant case decided the same question differently, as a matter of law, illustrates the proposition that reasonable minds may differ as to the effect of the agency relationship under the facts here presented.

The decision of the lower court is in conflict with the Court's decision in *Morley v. Rodberg,* 7 Utah 2d 299, 323 P. 2d 717 (1958), in which the plaintiffs were pedestrians who were struck by an automobile owned by Rodberg and driven by Kesler. Kesler was an automotive repairman and Rodberg had taken her car to him for repairs. He made some adjustments and then sought to test drive the car to determine the efficacy of his work. Rodberg accompanied him on the trip. During the test drive, the accident occurred due solely to Kesler's negligence.

The plaintiff sought to hold Rodberg liable for Kesler's negligence on an agency theory. Concerning the agency relationship between a mechanic and an automobile owner, the court concluded:

> "Although we have no quarrel with the authorities cited on both sides, some of which seem irreconcilable, we are convinced that under the facts of this particular case there was a jury question as to whether Kesler was an agent of Mrs. Rodberg, or an independent contractor, and that there was substantial competent evidence pointing to the latter status, such that on appeal the jury's verdict cannot be disturbed."

More directly in point and controlling here is the Utah case of *Johnson v. Hardman,* 6 Utah 2d 421, 315 P. 2d 853, (1957), in which the plaintiff was a passenger in an automobile which collided with a car driven by one Child and owned by Hardman. The facts established that Child approached Hardman and requested that the latter locate a truck for Child to purchase. Hardman located the truck in another town and traveled with Child in Child's vehicle to inspect the truck. Child indicated a willingness to purchase the truck, so Hardman purchased it from the owner for the sole purpose of reselling it to Child upon their arrival back home.

Hardman suggested that for the return trip home, Child drive the newly-acquired truck. Hardman drove the vehicle in which they had both travelled to see the vehicle which was purchased. While driving the vehicle which Hardman had thus just purchased, Child collided with the car in which the plaintiff was riding.

This Court there upheld a jury verdict in favor of the plaintiff upon the ground that Child was acting as the agent of Hardman at the time of the accident. The basis of the decision was that since Hardman was the owner of the truck and had requested that Child drive the truck, there was a sufficient basis for the jury to conclude that Child acted as Hardman's agent:

> "The substance of the instructions was that if the jury found: (1) that the ownership of the

> vehicle had not passed from Hardman to Child, and (2) that Hardman rquested Child to drive the truck back to Hardman's place of business at Sunset where the contract would be finally determined then Hardman would be responsible. The jury having so regarded the evidence, was indicated by their verdict for the plaintiff. The requisite relationship to liability upon Hardman was made out."

Thus, it can be seen that the rule of the *Hardman* case is consistent with the many cases cited above from other jurisdictions and that under the facts of the present case the question of agency should have been submitted to and determined by the trier of fact.

CONCLUSION

Under the rule that summary judgment is a drastic remedy which should be invoked only where the losing party could not prevail even though all favorable inferences from the evidence are resolved in his favor, it was error for the lower court to rule on the agency question as a matter of law and remove it as an issue to be determined by the trier of fact upon the basis of all the evidence and inferences to be drawn therefrom. As the many Utah and other state authorities cited above illustrate, a jury could reasonably find an agency relationship from the precise facts involved in this case.

There is ample substantial evidence in the record to justify submitting the agency question to the jury. As noted above, evidence such as that involved here has repeatedly been held sufficient to justify a finding of agency. Especially is this true in Utah where even less conclusive evidence on that question may be considered by a jury under the *Goddard* and *Adamson* cases.

The judgment of the lower court should be reversed and the case remanded for trial as to both defendants.

Respectfully submitted,

SKEEN, WORSLEY &
CHRISTENSEN

701 Continental Bank Building
Salt Lake City, Utah

Attorneys for Plaintiffs and
Appellants